IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ONE 1987 CHEVROLET PICKUP, VIN 1GCDR14K3HS172452,

and

ONE 1988 CHEVROLET CAVALIER, VIN 1G1JF11W7JJ248097,

Defendants.

CIVIL ACTION NO. 94-C-426-K

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture against the defendant vehicles and all entities and/or persons interested in the defendant vehicles, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 28th day of April 1994, alleging that the defendant vehicles were subject to forfeiture pursuant to 18 U.S.C. § 981, because they are properties involved in transactions or attempted transactions in violation of 18 U.S.C. §§ 1956 or 1957, or property traceable thereto.

Warrant of Arrest and Notice In Rem was issued on the 5th day of May 1994, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the

seizure and arrest of the defendant vehicles and for publication in the Northern District of Oklahoma.

On the 17th day of May 1994, the United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the defendant vehicles.

Willie Robinson, Norma J. Robinson, Tracy D. Robinson, Barbara Williams, and Norris Sucker Rods, a/k/a Dover Norris and Norris Rods, were determined to be the only potential claimants in this action with possible standing to file claims to the defendant vehicles and were personally served by the United States Marshals Service as reflected in the returns on file herein. No claims have been filed by any of the individuals or by Norris Rods, although Norris Rods did submit Petitions for Remission to the United States Department of Justice. After a petition investigation conducted by the Federal Bureau of Investigation (FBI), the United States Attorney for the Northern District of Oklahoma forwarded the Petitions for Remission, along with his recommendation that remission be granted, to the Criminal Division of the Asset Forfeiture Office, and by letter dated May 16, 1994, the acting director of the Criminal Division of the Asset Forfeiture Office granted remission to Norris Rods.

USMS 285s reflecting the service upon the defendant vehicles and all known potential claimants are on file herein.

All persons or entities interested in the defendant vehicles were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No other persons or entities upon whom service was effected more than thirty (30) days ago have filed a Claim, Answer, or other response or defense herein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant vehicle was located, on June 23 and 30 and July 7, 1994. Proof of Publication was filed August 4, 1994.

No other claims in respect to the defendant vehicles have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant vehicles, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant vehicles, and all persons and/or entities interested therein, except Norris Rods, whose Petitions for Remission of the defendant vehicles have granted by the

Department of Justice, subject to payment by Norris Rods of all costs incurred by the United States Marshals Service in serving, maintaining, and storing the defendant vehicles.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant vehicles:

ONE 1987 CHEVROLET PICKUP,
VIN 1GCDR14K3HS172452,

and

ONE 1988 CHEVROLET CAVALIER,
VIN 1G1JF11W7JJ248097,

be, and they hereby are, forfeited to the United States of America for disposition according to law, and the grant of the Petitions in remission, and accordingly, upon payment of the costs by Norris Rods, the United States Marshals Service shall release the defendant vehicles to Norris Rods.

Entered this 7 day of September 1994.

s/ TERRY C. KERN

TERRY C. KERN
United States District Judge

APPROVED:

CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\CHOOK\FC\ROBINSON.2\04114

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ONE 1989 FORD F250 PICKUP, VIN 1FTHX25MXKKA89024,

and

THE SUM OF TWO THOUSAND TWO HUNDRED THIRTY-FIVE DOLLARS ($2,235.00), IN UNITED STATES CURRENCY,

and

THE SUM OF ELEVEN THOUSAND TWO HUNDRED SEVENTY-EIGHT DOLLARS ($11,278.00) IN UNITED STATES CURRENCY;

FOR A TOTAL OF THIRTEEN THOUSAND FIVE HUNDRED THIRTEEN DOLLARS ($13,513.00) IN UNITED STATES CURRENCY,

Defendants.

ENTERED ON DOCKET
DATE SEP 09 1994

CIVIL ACTION NO. 94-C-446-K

FILED

SEP 08 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORFEITURE
OF $11,278 IN UNITED STATES CURRENCY

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by Default as to $11,278.00 of the defendant currency and all entities and/or persons interested in the $11,278.00 defendant currency, the Court finds as follows:

NOTE: THIS ORDER IS MAILED BY MOVANT TO COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

The verified Complaint for Forfeiture In Rem was filed in this action on the 2nd day of May 1994, alleging that the defendant currency was subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6), because it was furnished or intended to be furnished in exchange for a controlled substance, or is proceeds traceable to such an exchange, and subject to seizure and forfeiture to the United States.

Warrant of Arrest and Notice In Rem was issued on the 3rd day of June 1994, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant currency and for publication in the Northern District of Oklahoma.

On the 9th day of June 1994, the United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the defendant currency.

Bobby Gene Richardson was determined to be the only potential claimant in this action with possible standing to file a claim to the defendant currency. Bobby Gene Richardson filed a Claim as to the defendant vehicle and $2,235.00 of the defendant currency, only, on June 28, 1994. No claim has been filed by Bobby Gene Richardson as to the defendant $11,278.00 United States currency.

USMS 285s reflecting the service upon the defendant currency and all known potential claimants are on file herein.

All persons or entities interested in the defendant currency were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No other persons or entities upon whom service was effected more than thirty (30) days ago have filed a Claim, Answer, or other response or defense herein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant vehicle was located, on July 14, 21, and 28, 1994. Proof of Publication was filed August 16, 1994.

No other claims in respect to the $11,278.00 defendant currency have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant currency, and the time for presenting claims and answers, or other pleadings, has expired;

and, therefore, default exists as to the $11,278.00 defendant currency, and all persons and/or entities interested therein.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant currency:

THE SUM OF ELEVEN THOUSAND TWO HUNDRED SEVENTY-EIGHT DOLLARS ($11,278.00) IN UNITED STATES CURRENCY,

be, and it hereby is, forfeited to the United States of America for disposition according to law.

Entered this 8 day of September 1994.

s/ TERRY C. KERN

TERRY C. KERN
United States District Judge

APPROVED:

CATHERINE DEPEW HART
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BEVERLY JANE RUSSELL,

Plaintiff,

vs.

THE PENN MUTUAL LIFE INSURANCE COMPANY, INC.,

THE PENN INSURANCE AND ANNUITY CCMPANY, INC.,

MICHAEL PARTRIDGE, and

RYAN P. CURRY,

Defendants.

No. 89-C-272-E

ORDER AND JUDGMENT

This action came before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly tried and a jury having rendered its verdict, the Court grants Plaintiff's Motion to Vacate Administrative Closing Order (docket # 118). The Court grants Plaintiff's Motion for Default Judgment (docket # 117) against Defendant Curry.

IT IS THEREFORE ORDERED that the Plaintiff recover of the Defendant Curry the sum of $194,739.77 in compensatory damages, with interest thereon at the rate of 5.67 per cent as provided by law. Furthermore, Plaintiff is awarded $500,000.00 punitive damages against Defendant Curry.

ORDERED this 8th day of September, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ALFRED DEAN GEBBS;	)
BENEFICIAL OKLAHOMA, INC.;	)
HILLCREST MEDICAL CENTER;	)
CITY OF BROKEN ARROW, Oklahoma;	)
COUNTY TREASURER, Tulsa County, Oklahoma;	)
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)
	)
Defendants.	) **CIVIL ACTION NO. 94-C-524-E**

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 8 day of Sept, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, CITY OF BROKEN ARROW, Oklahoma, appears by Michael R. Vanderburg, City Attorney, Broken Arrow, Oklahoma; the Defendant, HILLCREST MEDICAL CENTER, appears not having previously filed a Disclaimer; and the Defendants, ALFRED DEAN GEBBS and BENEFICIAL OKLAHOMA, INC., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, ALFRED DEAN GEBBS, signed a Waiver of Summons on June 15, 1994, filed on June 16, 1994; that

the Defendant, BENEFICIAL OKLAHOMA, INC., was served a copy of Summons and Complaint on May 24, 1994, by Certified Mail; that the Defendant, HILLCREST MEDICAL CENTER, signed a Waiver of Summons on May 23, 1994, filed on May 26, 1994 and a Waiver of Summons on May 23, 1994, filed on June 15, 1994; the Defendant, CITY OF BROKEN ARROW, Oklahoma, was served a copy of Summons and Complaint on May 24, 1994, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on June 9, 1994; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer on June 3, 1994; the Defendant, HILLCREST MEDICAL CENTER, filed its Disclaimer on June 15, 1994; and that the Defendants, ALFRED DEAN GEBBS and BENEFICIAL MEDICAL CENTER, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on January 14, 1992, Alfred Dean Gebbs, filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-00114-W. On May 4, 1993, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor, and the case was subsequently closed on June 16, 1993.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real

property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT FIVE (5), BLOCK SIX (6), LEISURE PARK, AN ADDITION TO THE CITY OF BROKEN ARROW, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.
AKA 809 W. AUSTIN ST., BROKEN ARROW, OKLAHOMA 74011

The Court further finds that on July 5, 1989, the Defendant, ALFRED DEAN GEBBS and Michelle Y. Gebbs, executed and delivered to First Mortgage Corp., their mortgage note in the amount of $57,550.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, ALFRED DEAN GEBBS and Michelle Y. Gebbs, then husband and wife, executed and delivered to First Mortgage Corp., a mortgage dated July 5, 1989, covering the above-described property. Said mortgage was recorded on July 7, 1989, in Book 5193, Page 1241, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 28, 1989, First Mortgage Trust Corporation dba First Mortgage Corp., assigned the above-described mortgage note and mortgage to Fleet Mortgage Corp. This Assignment of Mortgage was recorded on August 14, 1989, in Book 5201, Page 51, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 24, 1992, Fleet Mortgage Corp. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of

Mortgage was recorded on December 1, 1992, in Book 5457, Page 149, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 1, 1992, the Defendant, ALFRED DEAN GEBBS and Michelle Y. Gebbs, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendant, ALFRED DEAN GEBBS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, ALFRED DEAN GEBBS, is indebted to the Plaintiff in the principal sum of $72,041.42, plus interest at the rate of Ten percent per annum from May 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $11.00 which became a lien on the property as of October 29, 1991, plus accrued and accruing interest. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, Oklahoma, claims no right title or interest in the

subject real property, except insofar as is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendants, ALFRED DEAN GEBBS and BENEFICIAL OKLAHOMA, INC., are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, and HILLCREST MEDICAL CENTER, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, ALFRED DEAN GEBBS, in the principal sum of $72,041.42, plus interest at the rate of Ten percent per annum from May 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $11.00, plus accrued and accruing interest, for personal property taxes for the year 1989, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, CITY OF BROKEN ARROW, Oklahoma, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat of.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, HILLCREST MEDICAL CENTER, ALFRED DEAN GEBBS, and BENEFICIAL OKLAHOMA, INC., have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, ALFRED DEAN GEBBS, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the

Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $11.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

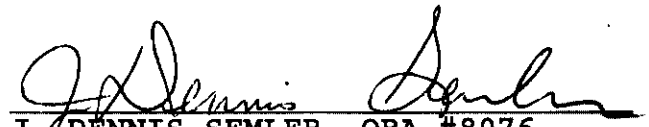
S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-524-E

NBK:flv

DL 9-7-94

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
SEP 08 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

GREGORY S. GOMEZ,

Plaintiff,

vs.

JOHN DOE, et al.,

Defendants.

Case No. 93-C-1080-K

ENTERED ON DOCKET
DATE SEP 08 1994

JOURNAL ENTRY ON CONFESSION OF JUDGMENT

This cause comes on for hearing on this 7 day of September, 1994. The Plaintiff, Gregory S. Gomez, appearing by Counsel, Kevin A. Schoeppel and F. Anthony Musgrave. Defendant, Board of County Commissioners of Tulsa County, Oklahoma, appearing by M. Denise Graham, Assistant District Attorney. The Court finds that these parties have entered the following stipulations:

1. On August 29, 1994, the Board of County Commissioners of Tulsa County, Oklahoma approved the recommendation of the District Attorney of Tulsa County, Oklahoma, to confess judgment in the case herein in the amount of One Hundred and Twenty Five Thousand Dollars ($125,000.00) under the following conditions:

a. The Defendant, Board of County Commissioners, is in no way admitting any liability or fault on the part of Sheriff Stanley Glanz, or any other unnamed employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma;

b. That the settlement of this case will result in a full release of any and all, past, present, or future claims against Defendant Board of County Commissioners of the County of Tulsa and any other unnamed employees and/or agents of the

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Tulsa County Sheriff or Tulsa County, Oklahoma, which Plaintiff Gregory S. Gomez has or may have as a result of the incidents alleged to have occurred herein;

c. That the settlement of this case will result in a full release of any and all, past, present, or future claims for attorney's fees under 42 U.S.C. § 1988, and costs associated therewith against Defendant Board of County Commissioners of the County of Tulsa, as well as against any unnamed employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma, which Plaintiff Gregory S. Gomez or his attorneys, Kevin A. Schoeppel and F. Anthony Musgrave, or the law firms of *Schoeppel and Curthoys* and *Musgrave and Parker* may have as a result of this judgment.

2. Plaintiff specifically reserves any rights against any other named parties not deemed to be employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma.

3. The physician's lien filed on August 23, 1994, with the Tulsa County Clerk, in the sum of $8,180.00, by Neurological Sugery Assoc., Inc. shall be paid out of the proceeds of this Judgment prior to any payments being paid to the Plaintiff herein.

4. Plaintiff is fully aware of the conditions upon which this confession of judgment is made and hereby fully accepts said conditions.

The Court accepts these stipulations and based upon said stipulations finds that the Plaintiff is entitled to recover the sum of One Hundred Twenty Five Thousand Dollars ($125,000.00) against the Board of County Commissioners of the County of Tulsa, Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff recover judgment against the Board of County Commissioners of Tulsa County, Oklahoma, in the sum of One Hundred Twenty Five Thousand Dollars ($125,000.00), with interest from the date hereof at 5.67% per annum. It is further ordered that the Tulsa County Treasurer, at the time of the first installment payment, shall first deduct the sum of $8,180.00, which

shall be paid directly to Neurological Surgery Assoc., Inc. and thereafter, pay any remaining balances owing to the Plaintiff, Gregory S. Gomez, through his attorney of record, F. Anthony Musgrave.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

GREGORY S. GOMEZ
Plaintiff

KEVIN A. SCHOEPPEL
Attorney for Plaintiff

F. ANTHONY MUSGRAVE
Attorney for Plaintiff

BOARD OF COUNTY COMMISSIONERS
OF TULSA COUNTY, OKLAHOMA

By:
M. DENISE GRAHAM
ASSISTANT DISTRICT ATTORNEY
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JANNETT EHIMIKA,

Plaintiff,

vs.

ST. JOHN MEDICAL CENTER, INC., an Oklahoma corporation,

Defendant.

Case No. 93-C-880-K

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a Dismissal With Prejudice of all causes of action set forth in Plaintiff's Complaint and asserted against St. John Medical Center, Inc. in this case.

DATED this 6 day of Sept, 1994.

PARRISH & FROSSARD

By: Laura Emily Frossard
Laura Emily Frossard
1154 East 61st Street
Tulsa, Oklahoma 74136

Attorneys for Plaintiff,
Jannett Ehimika

DOERNER, STUART, SAUNDERS, DANIEL, ANDERSON & BIOLCHINI

By: Rebecca M Fowler
Kathy R. Neal, OBA No. 674
Rebecca M. Fowler, OBA No. 13682
320 S. Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Defendant
St. John Medical Center, Inc.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SETH ASARE,

Plaintiff,

vs.

MARTINAIRE OF OKLAHOMA, INC.,

Defendant.

Case No. 94-C-229-BU

ORDER

On July 25, 1994, United States Magistrate Judge Jeffrey S. Wolfe entered an order extending the time for Plaintiff to effect service of process to August 31, 1994. To date, Plaintiff has not obtained service of process.

Every court has the inherent power in the exercise of sound discretion to dismiss a cause for want of prosecution. Stanley v. Continental Oil Company, 536 F.2d 914, 917 (10th Cir. 1976); e.g., Link v. Wabash Railroad, 370 U.S. 626 (1962)(inherent power vested in courts to manage own affairs so as to achieve orderly and expeditious disposition of cases). The propriety of such a decision depends on the procedural history of the particular case involved. Petty v. Manpower, Inc., 591 F.2d 615, 617 (10th Cir. 1979).

The procedural history of this case indicates that the failure to perfect service upon Defendant has barred resolution of this case on the merits. The case has been pending since March 11, 1994 and the Court finds that this litigation cannot be prolonged indefinitely by Plaintiff's inaction. Because Plaintiff has failed

to show good cause for his failure to effect service and the Court has inherent power to clear its calendar of a case that has remained dormant because of lack of prosecution, the Court hereby DISMISSES Plaintiff's complaint against Defendant without prejudice.

ENTERED this 7th day of September, 1994.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDSEY K. SPRINGER, et al.,

Plaintiffs,

vs.

COLLECTOR OF INTERNAL REVENUE, et al., JOHN DOES 1-10,

Defendants.

Case No. 94-C-350-BU

ORDER

This matter comes before the Court upon the Motion to Withdraw as Plaintiffs filed by Plaintiffs, Ross R. Hullett and Hazel A. Hullett, on August 31, 1994. Upon due consideration, the Court finds that the motion should be and is hereby GRANTED. The complaint of Plaintiffs, Ross R. Hullett and Hazel A. Hullett, against Defendants is hereby DISMISSED.

ENTERED this 7th day of September, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

LINDSEY K. SPRINGER, et al.,

Plaintiffs,

vs.

COLLECTOR OF INTERNAL REVENUE, et al., JOHN DOES 1-10,

Defendants.

Case No. 94-C-350-BU

ORDER

This matter comes before the Court upon the Motion to Withdraw as Plaintiffs filed by Plaintiffs, Charles D. McCally and Jodi J. McCally, on September 1, 1994. Upon due consideration, the Court finds that the motion should be and is hereby GRANTED. The complaint of Plaintiffs, Charles D. McCally and Jodi J. McCally, against Defendants is hereby DISMISSED.

ENTERED this 7 day of September, 1994.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDSEY K. SPRINGER, et al.,

Plaintiffs,

vs.

COLLECTOR OF INTERNAL REVENUE, et al., JOHN DOES 1-10,

Defendants.

Case No. 94-C-350-BU

ORDER

This matter comes before the Court upon the Motion to Withdraw as Plaintiffs filed by Plaintiffs, Timothy F. Goddard and Young Ja Goddard, on September 1, 1994. Upon due consideration, the Court finds that the motion should be and is hereby GRANTED. The complaint of Plaintiffs, Timothy F. Goddard and Young Ja Goddard, against Defendants is hereby DISMISSED.

ENTERED this 7th day of September, 1994.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDSEY K. SPRINGER, et al.,

Plaintiffs,

vs.

COLLECTOR OF INTERNAL REVENUE, et al., JOHN DOES 1-10,

Defendants.

Case No. 94-C-350-BU

ORDER

This matter comes before the Court upon the Motion to Withdraw as Plaintiffs filed by Plaintiffs, Richard M. LaBat and Rebecca J. LaBat, on August 29, 1994 and the Motion to Withdraw as Plaintiff filed by Plaintiff, Thomas L. Stuessy, on August 29, 1994. Upon due consideration, the Court finds that the motions should be and are hereby GRANTED. The complaints of Plaintiffs, Richard M. LaBat and Rebecca J. LaBat and Thomas L. Stuessy, against Defendants are hereby DISMISSED.

ENTERED this 7th day of ~~August~~ Sept., 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RUSSELL GILSTRAP and HELEN GILSTRAP, individuals,	)	
Plaintiffs,	)	
vs.	)	Case No. 94-C-297-BU
ST. FARM FIRE AND CASUALTY COMPANY, a corporation,	)	
Defendants.	)	

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiffs' action shall be deemed to be dismissed with prejudice.

Entered this 7th day of ~~August~~ Sept., 1994.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOLLAR SYSTEMS, INC., a Delaware corporation,

Plaintiff,

vs.

FOUR T's, INC., JOHN F. TROTTER, JOHN F. TROTTER, JR., SCOTT C. TROTTER, and TIMOTHY W. TROTTER,

Defendants.

Case No. 94-C-14-BU

ORDER OF DISMISSAL

Consistent with the stipulation by all parties in the above-captioned action dismissing all claims and counterclaims and pursuant to Fed. R. Civ. P. 41,

IT IS HEREBY ORDERED that the above action be and the same is dismissed with prejudiced as to all claims and counterclaims with each party to bear its own costs and attorney fees.

Dated this 7 day of Sept., 1994.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP [illegible] 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RONALD E. HIGHSMITH,

Plaintiff,

v.

DOWELL SCHLUMBERGER, INCORPORATED, A Delaware Corporation,

Defendant.

Case No. 93-C-0006-B

ENTERED ON DOCKET

DATE SEP 0 8 1994

ORDER OF DISMISSAL

This cause having come before this Court on the Joint Application for Dismissal with Prejudice of the parties, and this Court being fully advised in the premises, and the parties having stipulated and the Court having found that the parties have reached a private settlement of the claims of Plaintiff, and that such claims should be dismissed with prejudice, it is, therefore,

ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiff, together with any causes of action asserted therein, be and hereby are dismissed with prejudice. Each party is to bear its own attorney fees and costs.

So Ordered this 7th day of Sept, 1994.

Michael Burrage
United States District Judge

APPROVED AS TO FORM AND CONTENT:

Robert J. Bartlett
Attorney for Plaintiff

Attorney for Defendants

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FAIRFIELD AFFILIATES, A GENERAL PARTNERSHIP, c/o GE CAPITAL ASSET MANAGEMENT CORPORATION, Plaintiff, vs. JAMES D. VAN GREVENHOF and LINDA M. VAN GREVENHOF, husband and wife, Defendants.	)	Case No. 93-1147-B

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Fairfield Affiliates, a General Partnership, c/o GE Capital Asset Management Corporation, and Defendants, James D. Van Grevenhof and Linda M. Van Grevenhof, pursuant to Rule 41(a)(1) of the Fed.R.Civ.P., hereby stipulate that this action, together with all claims asserted herein, should be and are hereby dismissed with prejudice, each party to pay its own costs.

Respectfully submitted,

PHILLIPS, MCFALL, MCCAFFREY,
MCVAY & MURRAH, P.C.

By Mark E. Pruitt

Joseph K. Heselton, Jr.
Mark E. Pruitt
Twelfth Floor
One Leadership Square
211 North Robinson
Oklahoma City, OK 73102
ATTORNEYS FOR PLAINTIFF

DOERNER, STUART, SAUNDERS,
DANIEL, ANDERSON & BIOLCHINI

By

Lewis N. Carter, OBA #1524
320 South Boston Avenue
Suite 500
Tulsa, OK 74103-3725
(918) 582-1211
ATTORNEYS FOR DEFENDANTS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. STEWART W. WILSON; SANDRA A. WILSON; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	ENTERED ON DOCKET DATE

CIVIL ACTION NO. 94-C 539B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 6th day of Sept, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear not, claiming no right, title, or interest in the subject property; and the Defendants, **Stewart W. Wilson and Sandra A. Wilson**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, **Stewart W. Wilson and Sandra A. Wilson**, waived service of Summons on May 31, 1994, which was filed on June 6, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on June 9, 1994; and that the Defendants, **Stewart W. Wilson and Sandra A. Wilson**, have

failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **The West Half of the South Half of the West Half (W½S½W½) of Lot Four (4), Block One (1), SMITH'S SUBDIVISION in the County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on February 16, 1983, Roy Lee Hobbs, executed and delivered to REALBANC, INC. his mortgage note in the amount of $32,900.00, payable in monthly installments, with interest thereon at the rate of twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, Roy Lee Hobbs, executed and delivered to REALBANC, INC. a mortgage dated February 16, 1983, covering the above-described property. Said mortgage was recorded on March 1, 1983, in Book 4672, Page 2365, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 3, 1987, FirsTier Mortgage Co. (F/K/A Realbanc, Inc.) assigned the above-described mortgage note and mortgage to SECRETARY OF HOUSING AND URBAN DEVELOPMENT of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on November 6,

1987, in Book 5062, Page 1509, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Stewart W. Wilson and Sandra A. Wilson, currently hold fee simple title to the subject property via mesne conveyances; and the Defendants, Stewart W. Wilson and Sandra A. Wilson, are the current assumptors of the indebtedness.

The Court further finds that on July 1, 1989, the Defendants, Stewart W. Wilson and Sandra A. Wilson, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on September 1, 1989 and September 1, 1990.

The Court further finds that the Defendants, Stewart W. Wilson and Sandra A. Wilson, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Stewart W. Wilson and Sandra A. Wilson, are** indebted to the Plaintiff in the principal sum of $63,189.84, plus interest at the rate of 12 percent per annum from April 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, **County Treasurer and Board of County Commissioners, Tulsa County,**

Oklahoma, claim no right, title or interest in the subject real property

The Court further finds that the Defendants, **Stewart W. Wilson and Sandra A. Wilson**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, **Stewart W. Wilson and Sandra A. Wilson**, in the principal sum of $63,189.84, plus interest at the rate of 12 percent per annum from April 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Stewart W. Wilson, Sandra A. Wilson, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Stewart W. Wilson and Sandra A. Wilson**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants

and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 94-C 539B

NBK:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Carrol E. Cleere,

Defendant.

CIVIL ACTION NO. 94-C-567-B

DATE

AGREED JUDGMENT

This matter comes on for consideration this 6th day of ~~June~~ Sept., 1994, the Plaintiff, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and the Defendant, Carrol E. Cleere, appearing pro se.

The Court, being fully advised and having examined the court file, finds that the Defendant, Carrol E. Cleere, acknowledged receipt of Summons and Complaint on or about May 10, 1994. The Defendant has not filed an Answer but in lieu thereof has agreed that Carrol E. Cleere is indebted to the Plaintiff in the amount alleged in the Complaint and that judgment may accordingly be entered against Carrol E. Cleere in the principal amount of $62,127.19, plus accrued interest in the amount of $2,921.24 as of June 7, 1994, plus interest thereafter at the rate of 6.125% per annum until judgment, plus interest thereafter at the legal rate until paid, plus the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of $62,127.19, plus accrued interest in the

amount of $2,921.24 as of June 7, 1994, plus interest thereafter at the rate of 6.125% per annum until judgment, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

S/ THOMAS B. GRIEB

UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

WYN DEE BAKER
Assistant United States Attorney

Carrol A. Cleere

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT LEWIS BARBER,

Petitioner,

vs.

WARDEN THOMPSON,

Respondent.

No. 94-C-502-B

ORDER

Petitioner, a prisoner detained at Clio, Alabama, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction from Lee County, Alabama. He alleges in a conclusory fashion that he was arrested by policemen from Owasso, Oklahoma, for an Alabama prison while he was a patient at the Tulsa Regional Medical Center in Tulsa, Oklahoma. Petitioner alleges that his due process rights were violated because his parole was revoked without a hearing and because no charges were pending against him at the time of his arrest. Petitioner seeks release from confinement citing Morrisey v. Brewer, 408 U.S. 471 (1972). The Court previously granted Petitioner's motion for leave to proceed in forma pauperis and twice permitted Petitioner to clarify the allegations in his petition.

After carefully reviewing the petition and the exhibit attached to it as required by Rule 4 of the Rules Governing Section 2254 cases in the U.S. District Court, it seems to be apparent, in so far as habeas corpus is concerned, that Petitioner is complaining about his Alabama conviction or convictions and that

his claims may be more appropriately reviewed by a U.S. District Court in Alabama.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus (docs. #1, 4, and 6) be **summarily dismissed** pursuant to Rule 4 of the Rules Governing Section 2254 cases.

SO ORDERED THIS 6th day of Sept., 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH MACASTLE JACKSON,

Plaintiff,

vs.

RON CHAMPION,

Defendant.

No. 93-C-966-B

ORDER

In this prisoner's civil rights action, Plaintiff alleges a denial of his First Amendment right to practice his religion. Warden Champion has moved to dismiss on the ground that Plaintiff's action is barred by the doctrine of res judicata as it is a duplication of Case No. 90-C-1012-B and all issues were adjudicated on the merits in the previous action. In the alternative, Defendant argues that Plaintiff's action is barred by the statute of limitations. Plaintiff opposes Defendant's motion on the ground that the claim at issue was not previously litigated because Defendants failed to include policy No. OP-090112 in the court-ordered Martinez report. As to the statute of limitations, Plaintiff asserts that Okla. Stat. tit. 22, § 100 (1981) saves his otherwise untimely claim. For the reasons stated below, the Court concludes that Defendant's motion should be granted.

I. BACKGROUND

In December 1990, Plaintiff, a state inmate, filed Case No. 90-C-1012-B against numerous Department of Corrections officials, including Warden Ron Champion. He alleged violations of his First

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Amendment rights during his grooming-code-exemption process in November 1990. After the filing of several pleadings and a telephone conference, the Court granted Plaintiff's motion for injunctive relief, but ruled that Defendants were entitled to qualified immunity on the monetary damage claim. The Tenth Circuit Court of Appeals affirmed the judgment on February 22, 1993.

On October 28, 1993, Plaintiff filed the instant pro se action once again seeking damages against Warden Champion for violation of his First Amendment right during the grooming-code-exemption process in November 1990. In particular, he alleged that Defendant Champion failed to ensure that Plaintiff was allowed to follow "his recognized religious practice of choice" under prison regulation No. OP-090112. Plaintiff alleged that, although he attempted to present this claim in his first action, he did not have a chance to litigate it because defendants failed to include prison regulation No. OP-090112 in their court-ordered Martinez Report. Plaintiff also alleged a violation of several Oklahoma statutes.

II. ANALYSIS

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, 1512 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint are presumed true and construed in a light most

favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972).

Whether Plaintiff relies on a previously alleged legal theory or on a new theory, he cannot defeat the application of the doctrine of res judicata. The doctrine of res judicata precludes parties from relitigating issues that were or could have been raised in the previous action. See Clark v. Haas Group, Inc., 953 F.2d 1235, 1238-39 (10th Cir.) (cited authority omitted), cert. denied, 113 S.Ct. 98 (1992); see also Allen v. McCurry, 449 U.S. 90, 94 (1980); Rhodes v. Hannigan, 12 F.3d 989, 992 (10th Cir. 1993). In his present complaint, Plaintiff alleges that he would have litigated the present claim in his previous action if the defendants had included prison regulation No. OP-090112 in their Martinez report.

Nevertheless, even if Plaintiff's present action were not barred by the doctrine of res judicata, the Court concludes that Okla. Stat. tit. 12, § 100 (1991) does not save Plaintiff's otherwise barred claims. Because there is no federal statute of limitations for civil rights suits under 42 U.S.C. § 1983, the timeliness of a section 1983 action is measured by state law, including state's tolling provisions and state's savings provisions. Brown v. Harshorne Public School Dist. No. 1, 926 F.2d

959, 962 (10th Cir. 1991).[1] Section 100 reads as follows:

> If an action is commenced within due time, and a judgment thereof for the plaintiff is reversed, or if the plaintiff fails in such action otherwise than upon the merits, the plaintiff, or if he should die, and the cause of action survive, his representatives may commence a new action within one (1) year after the reversal or failure although the time limit for commencing the action shall have expired before the new action is filed.

Plaintiff's present suit does not fall within the scope of section 100. Plaintiff's first action did not "fail otherwise than upon the merits." The order attached to Plaintiff's complaint, indicates that this Court addressed the merits of Plaintiff's First Amendment claim in granting the requested injunctive relief and in denying his request for monetary damages. Moreover, the Tenth Circuit Court of Appeals at no time reversed the order granting injunctive relief in Plaintiff's favor. Therefore, Plaintiff's present action against Warden Champion for monetary damages is also barred by the two-year statute of limitations.

The Court declines to exercise pendent jurisdiction over Plaintiff's state claims. See 28 U.S.C. § 1367(c)(3); see also United Mine Workers v. Gibbs, 383 U.S. 715, 725-26 (1966).

III. CONCLUSION

The Court has construed all the allegations in the complaint in the light most favorable to the Plaintiff and concludes that Plaintiff's instant action is barred by the doctrine of res

---

[1]The applicable statue of limitations for section 1983 claims in Oklahoma is two years. See Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988).

judicata and by the two-year statute of limitations.

ACCORDINGLY, IT IS HEREBY ORDERED, that Defendant's motions to dismiss [docket #3] is **granted** and the above captioned case is **dismissed with prejudice.**

SO ORDERED THIS 6th day of Sept., 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 06 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

CAROLYN SUE BERGWALL, DEIDRE SLAMA, GAIL ROBERTS and BETTY FORBES,

Plaintiffs,

vs.

MIDWEST INDUSTRIAL CONTRACTORS, INC., MIDWEST SERVICE COMPANY and MATRIX SERVICE COMPANY

Defendants.

Case No. 93-C-630-B

ORDER OF DISMISSAL WITH PREJUDICE AND ORDER APPROVING SETTLEMENT

This matter comes on for hearing this 6th day of September, 1994, pursuant to Stipulation of Dismissal with Prejudice filed by Plaintiffs and joint request of all parties to approve the terms of a settlement between them. Thereupon, the Court being advised in the premises finds and Orders:

1. The above-captioned cause, and all claims herein, are hereby dismissed with prejudice to the right of the Plaintiffs or any of them, to refile the same.

2. The terms of that settlement between Plaintiffs and Defendants effective August 12, 1994, are hereby approved as being fair and equitable.

/s/ THOMAS E. BRETT

THOMAS E. BRETT, DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEE J. FINCH, JR;
DOLORES ANN FINCH;
TRANSAMERICA FINANCIAL SERVICES, INC.;
CITY OF JENKS, Oklahoma
COUNTY TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C-407-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 6 day of Sept, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, LEE J. FINCH, JR., DOLORES ANN FINCH, TRANSAMERICA FINANCIAL SERVICES, INC., and CITY OF JENKS, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, LEE J. FINCH, JR., Signed a Waiver of Summons on April 25, 1994, filed on May 9, 1994; that the Defendant, DOLORES ANN FINCH, signed a Waiver of Summons on April 25, 1994, filed on May 9, 1994; that the Defendant, TRANSAMERICA FINANCIAL SERVICES, INC., was served a copy of

Summons and Complaint on April 25, 1994 by Certified Mail; that the Defendant, CITY OF JENKS, Oklahoma was served a copy of Summons and Complaint on July 13, 1994 by Certified Mail.

The Court further finds that on February 15, 1991, DOLORES ANN FINCH filed her voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-00418-W. On April 18, 1994, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtor by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Seven (7), Block Eight (8), GLENNWOOD SOUTH, an addition the to the County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on February 26, 1987, Ted L. Hulett and Vanessa G. Hulett, executed and delivered to Mortgage Clearing Corporation, a mortgage note in the amount of $62,539.00, payable in monthly installments, with interest thereon at the rate of Nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, Ted L. Hulett and Vanessa G.

Hulett, Husband and Wife, executed and delivered to Mortgage Clearing Corporation, a mortgage dated February 26, 1987, covering the above-described property. Said mortgage was recorded on March 4, 1987, in Book 5005, Page 2509, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1988, Mortgage Clearing Corporation, assigned the above-described mortgage note and mortgage to Triad Bank, N.A. This Assignment of Mortgage was recorded on July 18, 1989, in Book 5195, Page 644, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 27, 1989, Triad Bank, N.A., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on October 30, 1989, in Book 5228, Page 1843, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 21, 1988, Ted L. Hulett and Vanessa G. Hulett, husband and wife granted a general warranty deed to the Defendants, LEE J. FINCH, JR. and DOLORES ANN FINCH, husband and wife. This deed was recorded with the Tulsa County Clerk on December 16, 1988, in Book 5146 at Page 584 and the Defendants, LEE J. FINCH, JR. and DOLORES ANN FINCH assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on November 1, 1989, the Defendant, DOLORES ANN FINCH, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due

under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on November 1, 1990, November 1, 1991, and October 1, 1992.

The Court further finds that the Defendants, LEE J. FINCH, JR. and DOLORES ANN FINCH, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, LEE J. FINCH, JR. and DOLORES ANN FINCH, are indebted to the Plaintiff in the principal sum of $85,829.89, plus interest at the rate of Nine percent per annum from March 1, 1994, until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $55.00 which became a lien on the property as of June 25, 1993, and a claim in the amount of $27.00 for 1993 taxes due. Said lien and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, LEE J. FINCH, JR., DOLORES ANN FINCH, TRANSAMERICA FINANCIAL SERVICES, INC., and CITY OF JENKS, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, LEE J. FINCH, JR. and DOLORES ANN FINCH, in the principal sum of $85,829.89, plus interest at the rate of Nine percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $82.00 for personal property taxes for the years 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, LEE J. FINCH, JR., DOLORES ANN FINCH, TRANSAMERICA FINANCIAL SERVICES, INC., CITY OF JENKS, Oklahoma, and BOARD OF

COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, LEE J. FINCH, JR., and DOLORES ANN FINCH, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $82.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of

redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

/S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-407-E

NBK:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EVELYN S. LAWSON)
)
Plaintiff,)
)
vs.) Case No. 94-CV-453-BU
)
TULSA INDEPENDENT SCHOOL DISTRICT,) JURY TRIAL DEMANDED
) Attorney's Lien Asserted
Defendant.)

ORDER

Plaintiff's claims against Tulsa Independent School District are dismissed without prejudice. Dated this 1st day of Sept, 1994.

Michael Burrage
JUDGE OF THE DISTRICT COURT

HOWARD AND WIDDOWS, P.C.
Sharon Womack Doty
OBA #14462
2021 South Lewis, Suite 470
Tulsa, OK 74104
(918) 744-7440
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 2 · 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LINDSEY K. SPRINGER, et al.,

Plaintiffs,

vs.

COLLECTOR OF INTERNAL REVENUE, et al., JOHN DOES 1-10,

Defendants.

Case No. 94-C-350-BU

ENTERED ON DOCKET

DATE SEP 06 1994

ORDER

This matter comes before the Court upon the Motion to Withdraw as Plaintiffs filed by Plaintiffs, Gerry D. Langston and Kelly M. Langston, on August 29, 1994 and the Motion to Withdraw as Plaintiff filed by Plaintiff, Allan Poole, on August 30, 1994. Upon due consideration, the Court finds that the motions should be and are hereby GRANTED. The complaints of Plaintiffs, Gerry D. Langston, Kelly M. Langston and Allan Poole, against Defendants are hereby DISMISSED.

ENTERED this 1st day of ~~August~~ Sept, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRY WILLIAM TOWLER,

Plaintiff,

vs.

LARRY FIELDS, et al.,

Defendants.

No. 93-C-965-K

JUDGMENT

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby enters judgment in favor of all Defendants and against the Plaintiff, Terry William Towler. Plaintiff shall take nothing on his claim. Each side is to pay its respective attorney fees.

SO ORDERED THIS 2nd day of September, 1994.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRY WILLIAM TOWLER,

Plaintiff,

vs.

LARRY FIELDS, et al,

Defendants.

No. 93-C-965-K

ORDER

In this prisoner's civil rights action, Plaintiff alleges that Defendants twice transferred him from one institution to another in violation of the Due Process and Equal Protection Clause, and that Defendants ultimately housed him in a maximum security prison in violation of the Cruel and Unusual Punishment Clause. Defendants have moved to dismiss or in the alternative for summary judgment. Plaintiff has objected. For the reasons stated below, the Court construes Defendants' motion as one for summary judgment and concludes that Defendants are entitled to judgment as a matter of law.

I. BACKGROUND

On February 16, 1993, Plaintiff, a state inmate at R.B. "Dick" Conner Correctional Center (DCCC), was charged with disrespect to a staff. Following an investigation, Plaintiff was deemed a security risk to the facility and on March 5, 1993, he was recommended for transfer in that he had a total of fifteen security points which is the minimum necessary to qualify for maximum security. On March 11, 1993, Plaintiff was transferred to

Lexington Correction Center (LCC). While at LCC on July 15, 1993, Plaintiff was again assessed maximum security and was recommended for administrative transfer. A facility assignment form was prepared on the same day recommending a transfer to Oklahoma State Penitentiary (OSP). (Doc. #7.)

On July 18, 1993, Plaintiff submitted a grievance to the warden at LCC requesting to be removed from Restrictive Housing Unit (RHU) or to be transferred to another facility. On July 19, 1993, the Warden advised Plaintiff that he was in "transit detention" and that the transfer request would be processed in a couple of days. Plaintiff was ultimately transferred to OSP on August 3, 1993. (Doc. #7.)

On October 28, 1993, Plaintiff, filed the instant pro se civil rights action under 42 U.S.C. § 1983 against Larry Fields, Director of the Oklahoma Department of Corrections; Michael Parsons, Deputy Director; Ron Champion, Warden of DCCC; and R.M. Cody, Warden of LCC. Plaintiff alleged that his transfer from DCCC to LCC and then from LCC to OSP was unjustifiable and without due process and equal protection of the law. He alleged that he "had a right to refute all allegations against him . . . [and] a right to partake in any classification decisions concerning him and his security level." He asserted that he was improperly classified as a maximum security inmate and that he had never escaped from an institution. In support of his Eighth Amendment claim, Plaintiff alleged that he was "being housed at, Oklahoma State Penitentiary a maximum security facility and [that] he does not fit any criteria to be a

maximum security inmate." Plaintiff sought compensatory damages and an order that all escape allegations be removed from his file. (Doc. #1.)

Defendants have moved to dismiss for failure to state a cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6). In the alternative, Defendants have sought summary judgment and attorneys fees under Federal Rule of Civil Procedure 56(b) on the basis of the court-ordered Martinez Report (Report). They argue that Plaintiff's transfer claim fails to allege a due process violation, that Plaintiff was not denied equal protection in his transfer to a maximum security facility, and that the conditions at OSP did not violate Plaintiff's Eighth Amendment rights. (Doc. #6.)

Plaintiff responds that he was denied his right to participate in any decisions regarding his classification status. He argues that he did not meet the criteria for a transfer to a maximum security prison and that he was kept in segregation from July 15 until August 3, 1993 on bogus escape charges which were later dismissed. Lastly, Plaintiff lists many of the conditions of confinement at OSP which allegedly subject him to cruel and unusual punishment.

II. SUMMARY JUDGMENT STANDARDS

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine

issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the nonmovant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for

relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. The court may treat the Martinez Report as an affidavit in support of a motion for summary judgment, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

III. ANALYSIS

After carefully reviewing the Martinez Report in the light most favorable to the Plaintiff, the Court concludes that Defendants are entitled to judgment as a matter of law on Plaintiff's complaint about his reclassification and regressive transfer. Plaintiff has no constitutional right to be incarcerated in a particular cell or facility, and his transfer from DCCC to LCC, and then from LCC to OSP, in and of itself, does not implicate a constitutional right of Plaintiff. See Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976); Moody v. Dagget, 429 U.S. 78, 88 n.9 (1976). Changing an inmate's prison classification ordinarily does not deprive him of liberty, because he is not entitled to a particular degree of liberty in prison. See Meachum, 427 U.S. at 225 (explaining that the Due Process Clause does not protect a prisoner against transfer to

another prison, even if more restrictive). Thus, any expectation Plaintiff may have had in remaining in general population at DCCC or at any other medium security facility is insubstantial to rise to the level of a due process violation. See Meachum, 427 U.S. at 228; Kincaid v. Duckworth, 689 F.2d 702, 704 (7th Cir. 1982), cert. denied, 461 U.S. 946 (1983); see also Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991) (because an inmate has no right to confinement in a particular institution, "[h]e cannot complain of deprivation of his 'right' in violation of due process"); Twyman v. Crisp, 584 F.2d 352 (10th Cir. 1978) (prisoner's transfer to maximum custody was completely within the sphere of authority of prison officials and prisoner had no legitimate claim of entitlement to remain in general prison population).

Additionally, federal courts do not interfere in classification and placement decisions. Such decisions are entrusted to the broad discretion of prison administrators, not to the federal courts. Moody, 429 U.S. at 88 n.9; Meachum, 427 U.S. at 228; Hewitt v. Helms, 459 U.S. 460, 467-68 (1983); Wilkerson v. Maggio, 703 F.2d 909, 911 (5th Cir. 1983); Twyman, 584 F.2d at 356-57. Accordingly, Defendants' motion for summary judgment should be granted on this ground.

As to Plaintiff's equal protection claim, the Court concludes that the Plaintiff has neither alleged nor established that the Defendants intentionally or purposefully discriminated against him, see Brisco v. Kusper, 435 F.2d 1046, 1052 (7th Cir. 1970) (the "Equal Protection Clause has long be limited to instances of

purposeful or invidious discrimination rather than erroneous or even arbitrary administration of state powers"), or that he is a member of a protected group. Plaintiff's equal protection allegation is simply based on the alleged deprivation of an individual right. See Gamza v. Aguirre, 619 F.2d 449, 453 (5th Cir. 1980) (holding that "isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause"). Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's equal protection claim.

Lastly, the Court concludes that Plaintiff's Eighth Amendment claim must also fail. To sustain an Eighth Amendment violation based on deliberate indifference, Plaintiff must allege and prove that the conditions evidence a wanton disregard for safety of prisoners and that prison officials had a "sufficiently culpable state of mind." Farmer v. Brennan, 114 S.Ct. 1970, 1977 (1994). Prison conditions "must not involve the wanton and unnecessary infliction of pain." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Neither can they be disproportionate to the severity of the crime warranting imprisonment. Id. The Eighth Amendment proscribes punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society" or those which "involve the unnecessary and wanton infliction of pain." Estelle v. Gamble, 429 U.S. 97, 102-03 (1976). Conditions resulting in the "unquestioned and serious deprivation of basic human needs" constitute cruel and unusual punishment." Rhodes, 452 U.S. at 347. In contrast:

> [C]onditions that cannot be said to be cruel and unusual under contemporary standard are not unconstitutional. to the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.

Id.

Under these clear legal precedents, the Court concludes that Plaintiff has failed to show a culpable state of mind on the part of the Defendants. The mere fact that the conditions of confinement at OSP are harsher and interfere with Plaintiff's desire to live as comfortably as possible does not suffice to establish that Defendants intentionally deprived Plaintiff of a constitutional right. Therefore, Defendants' motion for summary judgment should be granted on this ground as well.

III. CONCLUSION

After viewing the evidence in the light most favorable to the Plaintiff, the Court concludes that Defendants have made an initial showing negating all disputed material facts, that Plaintiff has failed to controvert Defendants' summary judgment evidence, and that Defendants are entitled to judgement as a matter of law.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss for failure to state a claim (doc. #6-1) is denied and that Defendants' motion for summary judgment (doc. #6-2) is granted.

SO ORDERED THIS 2nd day of September, 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
SEP 02 1994
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

GEORGIA B. BESSER, Individually and as the surviving spouse and next of kin of Darrel Richard Besser, Deceased,

Plaintiff,

vs.

FIBREBOARD CORPORATION, et al,

Defendants.

Case No. 91-C-932-B

DATE SEP 02 1994

ADMINISTRATIVE CLOSING ORDER

The Defendants Eagle-Picher Industries, inc., Celotex Corporation, Keene Corporation, Raymark Industries, Inc. and H.K. Porter Company, Inc. having filed their petitions in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any purpose required to obtain a final determination of the litigation.

IF, within sixty (60) days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 2nd day of September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT LOUIS WIRTZ,

Plaintiff,

vs.

RONALD J. CHAMPION, et al,

Defendants.

No. 93-C-920-B

ORDER

At issue before the Court in this prisoner's civil rights action are Plaintiff's claims (1) that Officer Joe Whatley inflicted cruel and unusual punishment when he shackled Plaintiff on his bare legs and forced him to walk to the Medical Unit and then to the Restrictive Housing Unit in spite of Plaintiff's alleged complaints of pain, and (2) that Warden Ronald Champion violated Plaintiff's due process rights when he failed to investigate Defendant Whatley's action. Defendants have moved to dismiss or in the alternative for summary judgment on the basis of a court-ordered Martinez report. Plaintiff has filed a motion "for alternative physician," and has objected to Defendants' motion to dismiss or for summary judgment. For the reasons stated below, the Court concludes that Defendants' motion to dismiss should be granted in part and that their motion for summary judgment should be granted in part.

I. BACKGROUND

On September 19, 1993, Plaintiff, a state inmate, was involved in a fight of which he was later found innocent. As soon as the

fighting was subdued, Officer Whatley (who had been called to the scene for back-up) shackled Plaintiff and escorted him to Dick Conner Correction Center (DCCC) Medical Unit for a check-up where the nurse noted bruises across Plaintiff's chest and his left cheek, and superficial scratches along his nose. Officer Whatley then escorted Plaintiff to Restrictive Housing Unit (RHU) where the shackles were removed. The Plaintiff was seen by medical staff on daily visits while in RHU until September 23, 1993, when he was released back to general population. On September 22, 1993, Plaintiff requested an appointment for his right ankle. The appointment was initially set for September 23, 1993, but later rescheduled for September 24, 1993. Plaintiff was not seen, however, until October 1, 1993, due to an alleged misunderstanding.

On October 13, 1993, Plaintiff filed the instant pro se civil rights action under 42 U.S.C. § 1983 against Warden Ron Champion and Officer Joe Whatley, alleging violations of his Eighth and Fourteenth Amendment rights.[1] Plaintiff alleged that, although the altercation was under control, Officer Whatley (1) "clamped the shackles on Plaintiff's bare ankles in a malicious manner," (2) refused to loosen the shackles although Plaintiff complained of pain, and (3) forced Plaintiff to walk a long distance to the Medical Unit and then to RHU "by pushing and pulling his cuffed

[1]Although Plaintiff's complaint does not state whether Defendants are being sued in their official or individual capacity, the Court concludes that Plaintiff has alleged sufficient facts to implicate Defendants in their individual capacity. See Hafer v. Melo, 112 S.Ct. 932 (1991). See also Plaintiff's response (doc. #20 at 12).

hands behind his back." Plaintiff alleged that the tight shackles on his bare skin caused severe cuts on his right ankle, numbness in his right foot and toes, and bruises on his tendons. As to his due process claim, Plaintiff alleged that Defendants refused to respond to a letter and a grievance and failed to investigate the incident at issue and reprimand Officer Whatley even though he had notified several officers, submitted a grievance, and spoken to the Unit Manager at DCCC. Plaintiff sought compensatory damages for his injuries and a "severe reprimand of Officer Whatley, possibly including the termination of his job." (Doc. #1.)

Defendants have moved to dismiss for failure to state a cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6). In the alternative, Defendants have sought summary judgment and attorneys fees under Federal Rule of Civil Procedure 56(b) on the basis of the Martinez Report (Report). They argue that Plaintiff's Eighth Amendment constitutional rights were not violated because Defendants were neither deliberately indifferent nor possessed a culpable state of mind during the events outlined in Plaintiff's complaint. Defendants also argue that Plaintiff has failed to allege any facts in support of his Fourteenth Amendment claim. Lastly, they raise qualified immunity and Eleventh Amendment immunity. (Doc. #15.)

In response to Defendants's motion, Plaintiff has submitted an affidavit countering the facts laid out in the Report and a brief discussing the applicable law.

II. ANALYSIS

A. Dismissal for Failure to State a Claim

1. Standard

Title 42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant Cty. Narcotics Unit, 113 S.Ct. 1160, 1163 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade, 841 F.2d at 1512 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for

failure to state a claim, all allegations in the complaint are presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972).

2. Discussion

Liberally construing Plaintiff's complaint in accord with his pro se status, the Court concludes that Plaintiff has sufficiently stated a claim for excessive use of force in violation of his Eighth Amendment rights. Plaintiff's complaint specifically alleges deprivations of his rights supported by sufficient facts. Furthermore, Plaintiff has attributed these deprivations to Officer Whatley acting under color of law through his capacity as employee of the Oklahoma Department of Corrections. Therefore, Defendants' motion to dismiss must be denied as to this issue.

The Court notes, however, that Plaintiff has not properly alleged deliberate indifference to a serious medical need although his complaint contains allegations about his medical condition and the care provided him during the events in question. Accordingly, because the Haines rule requires this Court to construe Plaintiff's pro se complaint liberally, see Haines v. Kerner, 404 U.S. 519, 520 (1972), and to grant him a reasonable opportunity to amend defects in his pleadings, see Hall, 935 F.2d at 1110 n.3 (citing Reynoldson v. Shillinger, 907 F.2d 124, 126 (10th Cir. 1990), Jaxon v. Circle

K Corp., 773 F.2d 1138, 1140 (10th Cir. 1985)), the Court grants Plaintiff an opportunity to amend his complaint to allege deliberate indifference to his ankle condition following the September 19, 1993 fight. Defendants' motion to dismiss should, therefore, be denied on this ground.

Next the Court addresses whether Plaintiff's due process claim fails to state a claim upon which relief can be granted. Plaintiff alleges that Defendant Champion failed to take any action in response to a letter and a written grievance concerning the September 19, 1993 display of excessive force on the part of Officer Whatley. In particular, Plaintiff alleges that Defendant Champion failed to respond to a letter, which Plaintiff wrote while in RHU, and to investigate and reprimand Officer Whatley.

After liberally construing Plaintiff's pro se complaint, the Court concludes that Plaintiff cannot establish any facts in support of his claim that Warden Champion's inaction deprived him of any constitutional or federal statutory rights. A prison official's failure, if any, to adequately respond to a prisoner's grievance does not implicate a constitutional right. See Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993) (per curiam) (official's failure to process inmates' grievances, without more, is not actionable under section 1983); Greer v. DeRobertis, 568 F.Supp 1370, 1375 (N.D.Ill. 1983) (prison officials' failure to respond to grievance letter violates no constitutional or federal statutory right); see also Shango v. Jurich, 681 F.2d 1091 (7th Cir. 1982) (a prison grievance procedure does not require the

procedural protections envisioned by the Fourteenth Amendment). "[A prison] grievance procedure is a procedural right only, it does not confer any substantive right upon the inmates. Hence, it does not give rise to a protected liberty interest requiring the procedural protections envisioned by the fourteenth amendment." Buckley, 997 F.2d at 495 (quoting Azeez v. DeRobertis, 568 F.Supp. 8 (N.D.Ill. 1982)); see also Mann v. Adams, 855 F.2d 639, 640 (9th Cir.), cert. denied, 109 S.Ct. 242 (1988) (an inmate has no legitimate claim of entitlement to a grievance procedure).

In any event, an official's "[f]ailure to comply with prison regulations does not give rise to a constitutional claim absent unmistakably mandatory language in the regulation." Johnson v. Rardin, 1992 WL 9019 *2 (10th Cir. 1992) (unpublished opinion) (citing Hewitt v. Helms, 459 U.S. 460, 471 (1983)). Plaintiff has not alleged any such mandatory language in the case at hand. Therefore, the Court concludes that Plaintiff may not base a section 1983 claim solely on allegations that Warden Champion failed to respond to a letter and an inmate grievance and failed to investigate the facts set forth in that correspondence.

In the alternative, the Court notes that Plaintiff's allegations assert, at most, negligent conduct which does not implicate the Due Process Clause. See Williams v. Meese, 926 F.2d 994, 998 (10th Cir. 1991) (negligent conduct by prison officials with respect to grievance procedure does not implicate the Due Process Clause). Accordingly, the Court concludes that Plaintiff can show no set of facts entitling him to relief under the Due

Process Clause and that Defendants' motion to dismiss for failure to state a claim should be granted on this ground.

B. Summary Judgment

1. Standard

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in

evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the nonmovant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. The court may treat the Martinez Report as an affidavit in support of a motion for summary judgment, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972). When reviewing a motion for summary judgment it is not the judge's function to weigh the evidence and determine the truth of the matter but only to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249.

2. Excessive Use of Force

The only remaining issue in this case is whether Officer Whatley used excessive force when he shackled Plaintiff on September 19, 1993, and forced him to walk to the Medical Unit and

then to RHU without loosening the shackles as Plaintiff repeatedly requested. In order to recover on this claim, Plaintiff must prove Officer Whatley used force resulting in the "'unnecessary and wanton infliction of pain." Hudson v. McMillian, 112 S.Ct. 995, 999 (1992) (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)). A de minimis use of physical force does not qualify as "wanton and unnecessary" unless it is of the sort "repugnant to the conscience of mankind." Id. at 1000 (citations omitted). While it is accepted that prison officials must occasionally resort to physical force to maintain and restore institutional order, they nevertheless must balance the institutional interest against the risk of harm to the inmates. Hudson, 112 S.Ct. at 999 (quoting Whitley, 475 U.S. at 321-22). Therefore, the "core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Id.

After viewing the evidence in the light most favorable to the Plaintiff, the Court concludes that there remain genuine issues of material facts as to whether Officer Whatley used excessive force when he "clamped" the shackles on Plaintiff's bare legs and forced him to walk to the Medical Unit and then to RHU without loosening the shackles as Plaintiff had repeatedly requested. Plaintiff and Officer Whatley offer conflicting evidence concerning the events following the September 19, 1993 fight, particularly, whether Officer Whatley became involved when the fight was already under control; whether Officer Whatley improperly shackled Plaintiff on

his bare legs; whether Officer Whatley failed to follow prison procedure in shackling Plaintiff; whether Officer Whatley heeded Plaintiff's numerous complaints that the shackles were too tight for him to walk; and whether the injury was complete only upon arrival at RHU. As there remain genuine issues of material fact, the Court concludes that Defendants' motion for summary judgment should be denied as to Officer Whatley on Plaintiff's excessive force claim.

Nevertheless, because Plaintiff has not shown how Warden Champion was personally involved in the excessive force claim, the Court concludes that he should be granted judgment as a matter of law on this claim. It is well established that for a supervisor to be liable in a civil rights suit for the actions of others there must be an affirmative link between the supervisor and the deprivation of the constitutional right. Meade v. Grubbs, 841 F.2d 1512, 1527 (10th Cir. 1988). That link can take the form of personal participation, an exercise of control or discretion, or a failure to supervise. Id. Plaintiff must show that the defendant expressly or otherwise authorized, supervised, or participated in the conduct which caused the deprivation. Snell v. Tunnell, 920 F.2d 673, 700 (10th Cir. 1990), cert. denied, 499 U.S. 976 (1991). Absent such a link, a supervisor is not liable for the actions of his employees. Id.

Plaintiff has neither alleged nor shown an affirmative link sufficient to establish liability as to Warden Champion on the excessive force claim. In his response, Plaintiff does not dispute

that Warden Champion was not involved in the actual events which are the basis of Plaintiff's excessive force claim. Rather he argues that Warden Champion participated in the alleged constitutional violation when "he failed to respond to Petitioner's letter requesting that he investigate this incident and provide a doctor for Plaintiff while he was in RHU on 1-20-93." (Doc. #20 at 7.) Accordingly, the Court concludes that judgment as a matter of law should be entered in favor of Warden Champion on Plaintiff's excessive force claim.

3. Qualified Immunity

In response to Plaintiff's complaint Defendants have asserted the defense of qualified or "good faith" immunity. Under qualified immunity, an official performing discretionary functions is immune from suit for actions objectively reasonable in light of clearly established law. See Anderson v. Creighton, 483 U.S. 635, 639-41 (1987); Chapman v. Nichols, 989 F.2d 393, 397 (10th Cir. 1993). The defense is intended to protect public officials from the burdens associated with trial. Hovater v. Robinson, 1 F.3d 1063, 1066 (10th Cir. 1993). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Chapman, 989 F.2d at 397. It is not required that the very action in question has been held unlawful, only that in light of pre-existing law the unlawfulness is apparent. Id. Government officials are deemed to have presumptive knowledge of basic constitutional rights. Id. (quoting

Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982)). A competent official is responsible for keeping abreast of constitutional developments and should know the law governing his conduct. Id. While legal scholarship is not required, law enforcement officials should know the extent to which their authority extends. Id.

Plaintiff's claims which survive summary judgment identify Eighth Amendment rights to be free from cruel and unusual punishment with regard to medical needs and excessive use of force. The contours of these right were clearly established at the time of the alleged violations. Prior to the events at issue in this case, the United States Supreme Court as well as the Tenth Circuit Court of Appeals had ruled that prison officials may be held liable under the Eighth Amendment for acting with deliberate indifference to an inmate's health, see Estelle v. Gamble, 429 U.S. 97 (1976); Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981), and for applying force "maliciously and sadistically to cause harm." See Hudson v. McMillian, 112 S.Ct. 995, 999 (1992); Barry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990). Therefore, qualified immunity does not protect Defendants for their actions in this case.

III. CONCLUSION

After liberally construing Plaintiff's complaint, the Court concludes that Defendant's motion to dismiss for failure to state a claim should be granted with regard to Plaintiff's due process

claim and denied as to Plaintiff's eighth amendment claims. As to Defendant's motion for summary judgment, the Court concludes that it should be denied because there remain genuine issues of material fact as to Plaintiff's excessive force claim.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendant's motion to dismiss for failure to state a claim (doc. #15-1) **is granted** as to Plaintiff's due process claim and **denied** in all other respects;

(2) Plaintiff may **file a motion for leave to amend and a proposed amended complaint**, if he so wishes, on or before twenty (20) days from the date of filing of this order to allege an eighth amendment claim as to his medical conditions following the alleged use of excessive force;

(3) Plaintiff's motion for alternative physician (doc. #11) is **denied without prejudice** to it being reasserted once the Plaintiff has had an opportunity to amend his complaint to allege deliberate indifference to a serious medical need; and

(4) Defendant's motion for summary judgment as to Plaintiff's excessive force claim (doc. #15-2) is **denied without prejudice** as to Officer Whatley and **granted** as to Warden Champion.

SO ORDERED THIS 2nd day of Sept, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP - 2 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

CAROLYN SUE BERGWALL, DEIDRE SLAMA, GAIL ROBERTS and BETTY FORBES,

Plaintiffs,

vs.

MIDWEST INDUSTRIAL CONTRACTORS, INC., MIDWEST SERVICE COMPANY and MATRIX SERVICE COMPANY

Defendants.

Case No. 93-C-630-B

SEP 0 2

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs, and each of them, and hereby stipulate and agree that the above-captioned cause, and all claims therein be, and are hereby dismissed with prejudice to their right to refile the same.

Plaintiffs and Defendants have settled all issues and pray the court approve the terms of this settlement and dismiss this action with prejudice.

Respectfully submitted,

By Donald M. Bingham

Donald M. Bingham, OBA #794
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
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ATTORNEYS FOR PLAINTIFFS

By Roger R. Scott

Roger R. Scott, OBA #8028
1111 ParkCentre
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Tulsa, Oklahoma 74103
(918) 583-8201
ATTORNEY FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILL G. BROWN, an individual; SANDRA H. BROWN, an individual; TERRY L. HESSONG, an individual; and TOBY L. LEWIS, an individual,

Plaintiffs,

vs.

SMS FINANCIAL, L.L.C., an Arizona Limited Liability Company,

Defendant.

Case No. 94-C-144-K

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41(a)(1)(ii), it is hereby stipulated and agreed between the parties, Plaintiffs Bill G. Brown, Sandra H. Brown, Terry L. Hessong and Toby L. Lewis and the Defendant SMS Financial, L.L.C., by and through their respective attorneys Blackstock & Hartman and Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., that the above-titled action be, and the same hereby is, dismissed with prejudice, each party to pay its own costs.

Dated this 2nd day of September, 1994,

Andrew S. Hartman
Margaret S. Millikin
BLACKSTOCK & HARTMAN
320 South Boston, Suite 2000
Tulsa, Oklahoma 74103-4713

ATTORNEYS FOR PLAINTIFFS

Dated this 2nd day of September, 1994,

R. Mark Petrich, Esq.
HALL, ESTILL, HARDWICK,
GABLE, GOLDEN & NELSON, P.C.
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172

ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLARENDON NATIONAL INSURANCE COMPANY and VAN-AMERICAN INSURANCE COMPANY, INC.,

Plaintiffs,

vs.

INDUSTRIAL MANAGEMENT SERVICES, INC.; GREEN ACRES ENTERPRISES, INC.; LARRY W. POMMIER and KAY L. POMMIER,

Defendants.

ENTERED ON DOCKET
DATE SEP 01 1994

No. 93-C-1127-B

FILED
SEP 01 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

J U D G M E N T

In accord with the Order filed August 31, 1994, granting the Plaintiffs' Motion to Set Amount of Attorney's Fees, the Court hereby enters judgment in favor of the Plaintiffs, Clarendon National Insurance Company and Van-American Insurance Company, Inc., and against the Defendants Industrial Management Services, Inc., Larry W. Pommier and Kay L. Pommier, for the amount of $23,181.24, plus interest accruing from August 31, 1994, at the legal rate of 5.67 percent per annum.

DATED this 1ST day of September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 92-C-27-E
	)	
JAMES D. DURHAM, et al.,	)	
	)	
Defendants	)	

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law entered by the Court on May 17, 1994, judgment is hereby entered in favor of the United States and against defendant James D. Durham in the amount of $455,832.17 plus interest accruing under the law after the dates of the assessment until paid.

Pursuant to the default entered against defendant George C. Gudgeon on May 6, 1993, judgement is hereby entered in favor of the United States and against defendant George C. Gudgeon in the amount of $455,832.17 plus interest accruing under the law after the dates of the assessment until paid.

8/31/94
Entered

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

CHARLES P. HURLEY
Trial Attorney
Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
(202) 514-6498

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE GARNEY COMPANIES, INC.,

Plaintiff,

vs.

CITY OF TULSA, OKLAHOMA; HTB, INC.; HMG, INC.; EXPEDITION, INC.; and MID-CONTINENT CONCRETE COMPANY;

Defendants.

No. 92-C-479 E

O R D E R

COMES NOW BEFORE THE COURT FOR CONSIDERATION the motions of Defendants Mid-Continent and HTB, Inc., to Realign Parties and Dismiss (docket # 223 and # 237).

This case arises out of the construction of a large sewage lift station for the City. HTB designed the facility and acted as Engineer for the construction of the facility. Plaintiff, Garney Companies, Inc. (Garney) was the general contractor for the project. Expedition, Inc., (Expedition) was the sub-contractor for the concrete work, Mid-Continent Concrete Company (Mid-Continent) was the supplier of the concrete, and HMG, Inc. (HMG) was the contractor building the inflow line to the lift station.

The housing for the lift station is an underground concrete vault. The claims in this case arise from the pouring of the base slab for the lift station which is a steel reinforced slab of

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concrete, approximately 55 feet square and 3 feet thick. During the pouring of the base slab, many difficulties were encountered, and it was learned that the upper mat of reenforcing steel had been displaced downward during the pour. HTB's structural engineer concluded that the displacement of the steel caused the slab to be inadequate to withstand forces to which it would be subjected, and ordered it removed and replaced.

Garney protested the order to remove and replace the slab on the ground that the slab was in fact of sufficient strength, but proceeded to remove the slab, as it was required to do by contract. After the replacement slab was completed, rains in the area washed large amounts of mud and silt into the excavation, and Garney incurred considerable expense in removing the mud and silt.

As a result of these occurrences, Garney brings this suit against the City, HTB, HMG, and Expedition. Expedition also makes claims against Mid-Continent for breach of contract, breach of warranty and negligence in failing to use ordinary care to provide an adequate design mix for the base slab.

Defendants Mid-Continent and HTB have filed Motions to Realign Parties and Dismiss Due to Lack of Subject Matter Jurisdiction. The significance of the role of courts in ensuring the proper delineation of parties in a lawsuit was stated in Indianapolis v. Chase Nat. Bank, 314 U.S. 63, 62 S.Ct. 15, 86 L.Ed. 47 (1941), reh'g. denied, 314 U.S. 714, 86 L.Ed. 569, 62 S.Ct. 355 (1941). "Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who

defendants." Id. at 17. A plaintiff's assignment of the parties to the roles of "plaintiff" and "defendant" is not binding on a court. The Supreme Court directed that the existence of a controversy cannot be determined by mechanical rules, but from examining the principal purpose of a lawsuit and the primary and controlling matter in dispute. Id.

The leading opinion on realignment in this circuit, Farmers Alliance Mutual Insurance Co. v. Jones, 570 F.2d 1384 (10th Cir. 1978), cert. denied, 439 U.S. 826, 99 S.Ct. 97, 58 L.Ed. 2d 119 (1978) offers guidance in addressing the issues of diversity jurisdiction raised by the parties in this action. A trial court must align parties according to their real interests, rather than their apparent interests.

> In diversity suits, courts will scrutinize the interests of the parties in order to determine if their positions as plaintiffs and defendants conform to their real interests. When appropriate, parties will be realigned; however, this is to be done only after real rather than apparent interests have been ascertained.

(citations omitted) Farmers at 1387. Upon determining the nature of the interests to be scrutinized, the Farmers court considered the temporal aspect: "[a]n action is deemed to commence at the time of filing of the complaint. Accordingly, we must examine the pleadings to determine if there was a justiciable controversy." Id. This Court must first look to Garney's First Amended Complaint for evidence of a justiciable controversy.

Paragraph 68 of Garney's First Amended Complaint alleges that Expedition breached its contract with Garney, but if and only if Defendants City and HTB *properly* rejected Expedition's work. Paragraph 70 of the First Amended Complaint essentially demands that Expedition indemnify Garney for any damages which Garney may be barred from collecting from Defendants City and HTB, if a jury finds that Defendants properly rejected Expedition's work. Garney's complaints against Expedition are speculative and not conclusive as to the existence of any actual controversy between the parties.

Plaintiff contends that the Court's examination of the parties' alignment is limited to consideration of the First Amended Complaint: "[w]hether Garney and Expedition have common strategies now, or at any time after the First Amended Complaint was filed is simply not pertinent." Garney's Response to Mid-Continent's Motion to Realign at 9. Plaintiff's focus on "common strategies" is misplaced. The necessary focus is on the finding of "actual controversy" necessary to maintain diversity jurisdiction. Farmers at 1386-1388. If adverse interests are not in evidence, the parties are improperly aligned. The Court can extend its examination of evidence beyond the pleadings. The opposite belief, asserted by Plaintiff, was the basis of the position taken by Justice Jackson, writing for the dissent in Indianapolis: "[t]he measure of jurisdiction should be taken from the pleadings unless the claims are frivolous on their face." Id. at 79, 62 S.Ct. at 21. In light of Supreme Court and Tenth Circuit

precedent, Justice Jackson's dissent is unpersuasive.

In Farmers, the Tenth Circuit considered the deposition of a party taken after the commencement of the action. Id. at 1387. The Circuit Court found the deposition lacking in facts to support realignment: "[the deposition], standing alone, [is] not supportive of the proposition that there is no actual controversy between the insurer and the insured." Id. The Tenth Circuit's consideration of the deposition indicates that courts can consider facts revealed after the filing of the complaint in addressing the alignment of parties. The Farmers court cited with approval Fireman's Fund Insurance Company v. Dunlap, 317 F.2d 443 (4th Cir. 1963). In Fireman's Fund, the Circuit Court reviewed a district court's determination -- upon consideration of the pleadings and discovery depositions -- that an actual controversy did not exist. Id. at 444.

A realignment decision can only weigh facts that existed at the time the complaint was filed. "Facts which can be used for forming the determination that realignment is proper must have been in existence at the time the action was commenced." Farmers at 1387. Not all facts that exist at the time the complaint is filed, however, are before the court at that time. Sources of facts other than the pleadings must then be scrutinized. "It is our duty, as it is that of the lower federal courts, to look beyond the pleadings, and arrange the parties according to their sides in the dispute." Indianapolis at 17.

In support of its Motion to Realign, Defendant Mid-Continent

cites the remarkable collaboration between Garney's counsel and Expedition's counsel in the filing of joint responses to motions, joint replies, and a joint witness list. Although unusual, these facts are insufficient to support an order of realignment. Similarly, that Garney and Expedition have not requested formal discovery from each other cannot support the proposition that there is no actual controversy between the parties, nor can the fact that one has not filed a dispositive motion adverse to the other. While these examples are symptomatic of parties whose interests are not in controversy, the Court must have direct evidence of the lack of an actual controversy before it can order realignment.

Direct evidence is available in the form of the actuality that neither Garney nor Expedition state any claim, contention, or cause of action against the other in the 99-page Disputed Pre-Trial Order. This lack of claims can be explained by the fact that no claims by Garney against Expedition ever existed. Garney's two allegations against Expedition in the First Amended Complaint are wholly contingent on judicial determinations of the actions of other Defendants. They do not comprise an actual, justiciable controversy between Expedition and Garney. The actions of Expedition and Garney in prosecuting this suit, the lack of any controversy between the parties in the Disputed Pre-Trial Order, and the lack of an actual controversy in the First Amended Complaint lead this Court to the conclusion that Plaintiff Garney and Defendant Expedition are misaligned.

Plaintiff Garney would have the Court adopt the reasoning

applied in Zurn Industries, Inc. v. Acton Constr. Co., 847 F.2d 234 (5th Cir. 1988). In that case, plaintiff made a claim to recover extra work performed under a contract. Zurn, however, is an example of the "principal purpose of the lawsuit" test adopted by the Third, Fifth, Sixth and Ninth Circuits. Employers Ins. of Wausau v. Crown Cork & Seal Co., 905 F.2d 42 (3d Cir. 1990); United States Fidelity & Guaranty Co. v. Thomas Solvent Co., 955 F.2d 1085 (6th Cir. 1992); Continental Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519 (9th Cir. 1987); Lowe v. Ingalls Shipbuilding, Div. of Litton Systems, Inc., 723 F.2d 1173 (5th Cir. 1984). The Tenth Circuit employs a different examination, which looks for the existence of an "actual controversy" as stated in City of Indianapolis by ascertaining "real rather than apparent interests." Farmers at 1387.

Realignment of Defendant Expedition as a party plaintiff is the only means by which the Court can accomplish its mandate to align parties according to their real interests. Realignment of now-Plaintiff Expedition, an Oklahoma Corporation, with Garney, a Missouri corporation, destroys diversity in this case, as Defendants City of Tulsa, HTB, and HMG are Oklahoma corporations. Realignment can destroy diversity. Helm v. Zarecor, 222 U.S. 32, 32 S.Ct 10, L.Ed. 77. A diversity action should be dismissed if at anytime it becomes apparent that there is a lack of diversity. Bradbury v. Dennis, 310 F.2d 73 (10th Cir. 1962), cert. denied, 372 U.S. 928, 9 L.Ed. 733, 83 S.Ct. 874 (1963). Therefore, because no other basis for this Court's jurisdiction exists, the Court must

dismiss the parties for lack of jurisdiction over the action.

IT IS THEREFORE ORDERED that Defendant Expedition, Inc., is REALIGNED as Plaintiff. IT IS FURTHER ORDERED that this case is DISMISSED for lack of jurisdiction.

ORDERED this 1st day of September, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In Re MID-STATES AIRCRAFT ENGINES, INC., an Oklahoma corporation

No. 94-C-154-E

ADMINISTRATIVE CLOSING ORDER

IT IS HEREBY ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that further litigation is necessary.

ORDERED this 31st day of August, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANDY SPODNICK,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, Donna Shalala, Secretary,

Defendant.

93-C-0304-E

ORDER

Andy Spodnick applied for Social Security disability benefits, claiming he was disabled because of a broken neck, knee and feet problems. The Secretary of Health and Human Services ("Secretary") denied the application. Mr. Spodnick now appeals that decision.

The issues raised by Mr. Spodnick can be divided into two categories. First, did the Administrative Law Judge ("ALJ") err in his decision concerning Mr. Spodnick's alleged physical impairments? Second, did the ALJ err in his decision concerning Mr. Spodnick's claim of illiteracy? The court answers the first issue in the negative. However, the case will be remanded because the ALJ improperly examined Plaintiff's illiteracy claim.

I. Procedural History

On June 5, 1991, Mr. Spodnick applied for benefits, claiming he had been unable to work since June 27, 1990. He says he is disabled because of a broken neck and problems with his feet and knees. He fractured his neck in 1987 during a diving accident in a swimming pool. His feet and knee problems stem from long-standing injuries. Mr.

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Spodnick also says he can not read or write. He was 47 years old at the time of the hearing and had completed 10 years of "special education."

When deciding a claim for benefits under the Social Security Act, the ALJ must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

In this case, the ALJ proceeded to step 5 and found that Mr. Spodnick could return to work. Using Rules 201.19 and 201.20 as "framework for decisionmaking", the ALJ concluded that Mr. Spodnick could return to sedentary work as a bench assembler. The ALJ also noted that Mr. Spodnick could do no prolonged standing or walking or light, medium, heavy or very heavy work. *Record at 53.*

Mr. Spodnick now challenges that decision, raising the following issues: (1) Did the ALJ abide by the "treating physician" rule? (2) Did the ALJ improperly evaluate Spodnick's complaints of pain? (3) Did the ALJ err in his hypothetical questioning of the vocational expert? (4) Did the ALJ misapply the medical-vocational guidelines? (5) Did the ALJ adequately develop the record concerning Mr. Spodnick's claim of illiteracy?

II. Legal Analysis

The first four issues raised by Mr. Spodnick revolve around how the ALJ examined

evidence concerning his alleged physical impairment (i.e. the broken neck, problems with feet and knees). In particular are two letters from Dr. Dan Springer and Dr. Douglas Smiley, a chiropractor.

On July 20, 1992 Dr. Springer wrote that Mr. Spodnick could not sit for long periods of time. On July 13, 1992, Dr. Douglas Smiley, a chiropractor who examined Mr. Spodnick three times, wrote that Mr. Spodnick could not work in a job where he would be confined to any one position for more than a brief period of time. *Record at 42-44.* Mr. Spodnick, in effect, argues that the Secretary erred in how it "weighed" those letters. The Court disagrees.

Mr. Spodnick first contends that Drs. Springer and Smiley are treating physicians. The treating physician rule mandates that the Secretary give substantial weight to the claimant's treating physician unless good cause dictates otherwise. Therefore, Mr. Spodnick argues the ALJ violated the rule. That argument is without merit. The letters in question were submitted after the ALJ issued his denial decision. As such, no violation of the treating physician rule took place.

In addition, the letters do not support a disability finding. First, neither of them state that Mr. Spodnick can no longer work. Second, Dr. Springer examined Mr. Spodnick twice within a year period. Dr. Smiley examined Mr. Spodnick three times during an 18-month period. Such infrequent examinations should be considered as a variable in weighing their opinions. Third, Dr. Springer's letter is inconsistent with his earlier findings in the record. Last, Dr. Smiley submitted none of his records to support his conclusions. Furthermore, the Appeals Council considered him to be an unacceptable source. *See Record*

at page 4 and 20 C.F.R. 404.1513(a). Also, see, generally, Edwards v. Sullivan, 937 F.2d 580, 583 (11th Cir. 1991)("*The treating physician's report may be discounted when it is not accompanied by objective medical evidence or is wholly conclusory.*")[1]

A second issue raised by Mr. Spodnick is that the ALJ did not properly evaluate his complaints of pain. This argument is without merit. The rule governing evaluation of complaints of pain is examined in *Luna v. Bowen* 834 F.2d 161 (10th Cir. 1987). The ALJ must first determine whether a claimant has established a pain-producing impairment by objective medical evidence. Second, the ALJ must decide whether there is a "loose nexus" between the impairment and a claimant's subjective allegations of pain. If those two prongs are met, the question becomes whether, considering all the subjective and objective evidence, a claimant's pain is, in fact, disabling. *Id. at 163-164.*

In the instant case, the ALJ found that Plaintiff established a pain-producing impairment. The ALJ also found a loose nexus between the impairment and Plaintiff's subjective allegations of pain. However, the ALJ -- after considering all the subjective and objective evidence -- decided that Plaintiff's pain was not disabling.

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[1] *The ALJ did not err in how he "weighed" the evidence concerning Mr. Spodnick's alleged physical impairments. Dr. Schaf treated Mr. Mr. Spodnick after his 1987 diving accident. On June 27, 1987, doctors indicated that Mr. Spodnick had a fracture of C-5 and C-6. Two months later, however, Dr. Schaf noted that Mr. Spodnick was doing "remarkably well" and wearing a "Philadelphia collar."On September 15, 1987, the collar was removed. On December 8, 1987, Dr. Schaf noted that the "X-rays looked excellent with good fusion." The doctor also indicated that Mr. Spodnick could return to work "as long as it is not strenuous and it is essentially light to moderate duty." Record at 184. Dr. Schaf next examined Mr. Spodnick some three years later, noting that the patient had "intermittent pain but...no obvious neurologic deficit." Id. On August 2, 1991, Dr. Kathleen A. Dahlmann, an M.D. and consulting physician, examined Mr. Spodnick. She diagnosed him with Osteoarthoparthy, but concluded that "no medical abnormality" precluded Mr. Spodnick from working. Id. at 196. On May 5, 1992, the ALJ held a hearing where vocational expert Dr. Ann Young testified. In response to the ALJ's hypothetical, Dr. Young said that Mr. Spodnick could work as a bench assembly worker. Obviously, the testimony of Mr. Spodnick and his wife, the evidence submitted by Drs. Springer and Harris support Mr. Spodnick's disability claim. But it is within the province of the ALJ to weigh the evidence. See Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983) (Court acknowledged that "the evidence is such as to permit varying inferences...[but] the ALJ came to grips with the problem, and, on such state of the record, for us to disturb his finding would simply put us into the fact-finding business. This we should not do.")*

Contrary to Mr. Spodnick's argument, the ALJ followed the *Luna* procedure. In *Luna,* the Tenth Circuit listed factors to determine a claimant's credibility regarding subjective complaints of pain as (1) a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed; (2) regular use of crutches or a cane; (3) regular contact with a doctor; (4) possibility that psychological disorders combine with physical problems; (5) claimant's daily activities; and (6) dosage, effectiveness and side effects of medication. Here, the ALJ discussed many of these factors. *Record at 50-51.* He then wrote:

> The ALJ finds that claimant's pain is no more than mild to moderate and, as such, would not interfere with his concentration or performance of work-related activities at a sedentary level. The claimant testified to no significant difficulties while being seated, which is the primary position for sedentary work. *Id. at 51.*

A third issue raised by Mr. Spodnick concerns the Vocational Expert's testimony. "Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991).

Mr. Spodnick argues that his inability to sit should have been included in the hypothetical question. Again, this returns to the issue of the letters submitted Drs. Springer and Smiley. However, from a practical standpoint, the ALJ could not have included such information in the hypothetical because it was not submitted to him before his decision. More importantly, however, the ALJ does not have to include all of the claimant's alleged impairments; he must only include the impairments which he accepts as true. Therefore, this issue, too, is without merit.

The final issue meriting discussion is that the ALJ did not properly develop the record. Mr. Spodnick claims that the ALJ did not adequately inquire as to his illiteracy. The ALJ found that Mr. Spodnick was literate and had a "limited education."[2] That finding is suspect.

In *Dixon v. Heckler*, 811 F.2d 506 (10th Cir. 1987), a claimant claiming illiteracy was denied benefits by the Secretary. The Tenth Circuit, however, reversed the finding because substantial evidence of the claimant's literacy was not in the record. Wrote the court:

> For purposes of applying the grids, illiteracy means the ability to read or write. We consider someone illiterate if the person cannot read or write a simple message such as instructions or inventory lists even though the person can sign his or her name. Generally, an illiterate person has had little or no formal schooling. ***20 C.F.R. § 1564(b)(1).*** This definition makes explicit that literacy turns upon the ability to write as well as read. *Dixon, 811 F.2d at 510.*

The Tenth Circuit required, at a minimum, that the record show that a claimant could write a simple message such as instructions or inventory lists. *Id.* The court concluded that the ALJ should have more adequately developed the record concerning the claimant's literacy.

This court applies the same reasoning to the case at bar. First, the ALJ in *Dixon* made a better effort to inquire about the claimant's literacy than the ALJ did here. Few questions were asked of Mr. Spodnick concerning his literacy or his abilities in this area. Second, although few questions that asked of Mr. Spodnick concerning his literacy, the ALJ

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[2] *Limited education "means ability in reasoning, arithmetic, and language skills, but not enough to allow a person with these educational qualifications to do more of the most complex job duties needed in semi-skilled or skilled jobs. We generally consider that a 7th grade through the 11th grade of formal education is a limited education." 20 C.F.R. § 404.1564(a)(3).*

apparently accepted the fact that Mr. Spodnick could "barely" read or write. *Record at 52.* Such a "fact" was supported by Mr. Spodnick's testimony, a report from Dr. Harris, Mr. Spodnick's wife statement that her husband could read only at the 2nd, 3rd or 4th grade levels and comments from Mr. Spodnick's attorney (who told the ALJ that his client was unable to fill out any of the disability paperwork). The record also shows that Mr. Spodnick had 10 years of "special education". Taking this all into account, the ALJ found that Mr. Spodnick was literate and had a "limited education."

That finding is improper for two reasons. First, the ALJ has a duty to fully develop the record. *Thompson v. Sullivan*, 987 F.2d 1482 (10th Cir. 1993). He did not. Second, it is unclear as to whether substantial evidence supports such a finding.

Of particular import is that the ALJ accepted the fact that Mr. Spodnick could "barely" read or write. That finding, which is not refuted anywhere in the record, suggests he does not have a limited education.[3] And, while Mr. Spodnick completed 10 years of schooling, that, in itself, is not determinative -- especially given the fact it was described as "special education." *See, 404.1564(b) (formal years of schooling is not dispositive unless there is no other evidence to contradict it.)*[4]

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[3] *20 C.F.R. §404.1564(a)(6) reads: "We [the Secretary] will ask you how long you attended school and whether you are able to speak, understand, read and write in English and do at least simple calculations in mathematics. We will also consider other information about how much formal and informal education you may have had through your previous work, community projects, hobbies, and any other activities which might help you to work." The ALJ generally inquired as to whether Spodnick could read and write, but it is unclear as to whether he was asked about doing simple mathematical calculations. In addition, the ALJ did not adequately inquire as to Spodnick's "informal" education concerning his literacy. It also should be noted that the fact the ALJ offered no explanation of his "limited education" finding hindered a review by this Court.*

[4] *The Appeals Council's explanation of the ALJ's decision does not clarify the issue. The Appeals Council wrote that "your wife stated that you read slowly by the sound of letters and that you could read at a 2nd, 3rd or 4th grade level. She also indicated that she would leave a note for you to return the call of the author of this exhibit. This description of your ability to read does not fit the definition of illiteracy as found in 20 C.F.R. §404.1564(b)(1). Further you testified that you completed the tenth grade and attended special education classes. However, you did not provide any school records to support your allegation of illiteracy." Record at 3. The Court questions the Appeal Council's evidence (i.e. leaving a phone message) as credible proof. It should be noted that it is the Secretary's burden at step 5 of the analysis to show Spodnick's literacy.*

Upon review, the court finds that the ALJ, at a minimum, should have inquired more extensively into Mr. Spodnick's claim of illiteracy.[5] Therefore, the case is REMANDED.

On remand, the ALJ should have Mr. Spodnick examined by a specialist to determine whether he can read and/or write and, if so, on what level. Once that examination is complete, the ALJ can re-examine the evidence in light of the specialist's finding, including taking of further testimony from the Vocational Expert.

SO ORDERED THIS 31st day of August, 1994.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

[5] *In Glenn v. Secretary of Health and Human Services, 814 F.2d 387 (7th Cir. 1987), a 46-year-old claimant argued that he was illiterate. In examining that case, the appellate court noted that very few sedentary jobs are available in the economy for people who can't read or write. The Vocational Expert's testimony on this point was, at best, minimal. In addition, since the ALJ did not inquire adequately as whether Mr. Spodnick was illiterate, the Vocational Expert was given limited information in the hypothetical question. The record should be more fully developed regarding Plaintiff's literacy and the issue re-submitted to the Vocational Expert for further testimony.*

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, OKLAHOMA, Plaintiff,	
vs.	Case NO. 94-C-310-B
0.52 ACRES OF LAND IN THE SW/4 OF SECTION 5, TOWNSHIP 21 NORTH, RANGE 6 EAST, IN PAWNEE COUNTY, OKLAHOMA; STELLA KNIFECHIEF, deceased, PAWNEE ALLOTMENT AND ALLOTTEE NO. 428-C2, et al., and UNKNOWN OWNERS, Defendants.	

AGREED ORDER OF CONDEMNATION

NOW, on this 31 day of August, 1994, pursuant to the Court's order of the 26th of July, 1994, the parties to the above styled lawsuit enter into this Agreed Order of Condemnation and submit the same to the Court.

The Plaintiff, Board of County Commissioners of Pawnee County, Oklahoma appear by and through, John S. Boggs, Jr., Assistant District Attorney; the defendant, State of Oklahoma ex rel., Oklahoma Tax Commission, appears not, having filed it disclaimer in the specific real estate involved in this action; the remainder of the defendants as named in the Plaintiff's second amended complaint in condemnation appear by Wyn Dee Baker, Assistant United States Attorney for the Northern

EDO 9/1/94

District of Oklahoma and by Charles Babst, U.S. Department of Interior, Solicitor, of counsel to the United States Attorney; there are no other appearances.

The Court, after hearing statements of counsel and the agreement of the parties, and being fully advised, upon consideration, finds as follows:

That all parties have been duly and properly served and notice by publication has been done, all as required by law.

That the taking and condemnation of the property described in Plaintiff's petition herein, to-wit:

> A strip, piece of parcel of land lying in the SW/4 of Section 6,T21N, R6E, in Pawnee County, Oklahoma. Said parcel of land being described as follows:
> The South 150.00 feet of the East 250.00 feet of the West 1050.00 feet of said SW/4; also described as follows:
> Beginning at point 800 feet East of the SW corner of said SW.4 thence 250 feet East along said South line of said SW/4, thence North 150 feet, thence West 250 feet, thence South 150 feet to the point of beginning.
> Containing 0.52 acres, more or less, of new right of way, the remaining area included in the above description being right of way occupied by the present county road,

is necessary for the purposes of the Plaintiff in order to construct and maintain a bridge and approaches on a Pawnee County road and said taking and condemnation is by way of a perpetual roadway easement;

That the Plaintiff has duly paid to the United

States of America by and through the United States Department of Interior, Bureau of Indian Affairs as trustee for the heirs of Stella Knifechief, deceased, Pawnee Allotment and Allottee No. 428-C2 the amount of Twelve Hundred Dollars ($1,200.00) for the taking and condemnation of the real estate described in Plaintiff's petition.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff's taking and condemnation by way of a perpetual roadway easement in the following describe property, to-wit:

> A strip, piece of parcel of land lying in the SW/4 of Section 6,T21N, R6E, in Pawnee County, Oklahoma. Said parcel of land being described as follows:
> The South 150.00 feet of the East 250.00 feet of the West 1050.00 feet of said SW/4; also described as follows:
> Beginning at point 800 feet East of the SW corner of said SW.4 thence 250 feet East along said South line of said SW/4, thence North 150 feet, thence West 250 feet, thence South 150 feet to the point of beginning.
> Containing 0.52 acres, more or less, of new right of way, the remaining area included in the above description being right of way occupied by the present county road,

be deemed complete and final and that the appropriation by Plaintiff in this proceeding is approved and confirmed.

IT IS SO ORDERED. S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

APPROVED:

JOHN S. BOGGS JR.
ATTORNEY FOR PLAINTIFF

WYN DEE BAKER
ATTORNEY FOR DEFENDANTS

CHARLES BABST
ATTORNEY FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLARENDON NATIONAL INSURANCE COMPANY and VAN-AMERICAN INSURANCE COMPANY, INC.,	)	
Plaintiff,	)	
vs.	)	Case No. 93-C-1127-B
INDUSTRIAL MANAGEMENT SERVICES, INC.; GREEN ACRES ENTERPRISES, INC.; LARRY W. POMMIER and KAY L. POMMIER,	)	
Defendants.	)	

ORDER

Before the Court are a Motion to Set Amount of Attorneys' Fees (Docket #34) filed by Plaintiffs Clarendon National Insurance Company and Van-American Insurance Company, and a Motion for Relief from Judgment (Docket #35) pursuant to Fed.R.Civ.P. 60(b) filed by Defendants Larry W. Pommier and Kay L. Pommier.

The Court entered an Order on April 15, 1994, granting Summary Judgment against Defendants Industrial Management Services, Inc. ("IMS"), Larry W. Pommier ("L. Pommier") and Kay L. Pommier ("K. Pommier"). Defendants did not dispute the facts alleged in Plaintiffs' Motion for Summary Judgment. The Court found that IMS, L. Pommier and K. Pommier breached contractual obligations arising from the purchase of a Coal Mining and Reclamation Surety Bond from Plaintiffs. The Court found that the Defendants caused the forfeiture of the bond to the Oklahoma Department of Mines ("ODOM")

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when they did not perform their reclamation obligations as required by the General Indemnity Contract between Plaintiffs and Defendants.

L. Pommier and K. Pommier filed a motion for relief from judgment under Fed.R.Civ.P. 60(b) "on the grounds that the judgment against them has been satisfied" because Plaintiff's obligation to the State of Oklahoma has been released. Fed.R.Civ.P. 60(b)(5) states that the Court may relieve a party from final judgment if the judgment has been satisfied, released or discharged.

L. Pommier and K. Pommier contend that on July 18, 1994, an irrevocable letter of credit in the amount of $216,600 was issued by Farmers State Bank of Pleasanton, Kansas. They allege that ODOM then issued a Notice of Bond Release, which states that Bond No. VAN-91-0032 in the amount of $216,600 (the bond at issue in this case) was released and replaced by the letter of credit. Therefore, the Defendants allege, the judgment against them has been satisfied because the bond was returned to the Plaintiffs.

Plaintiffs point out, however, that ODOM has canceled the bond release. (Plaintiff's Response to Motion for Relief from Judgment, Exh. 1). The settlement agreement (Exh. 3) between ODOM and Plaintiff Van-American dated May 23, 1994, specifically provides that the bond has been forfeited. Further, the Judgment of this Court included, in addition to the $216,600 face amount of the bond, damages for non-payment of premiums that totaled $11,913, costs and attorneys' fees. The Defendants do not assert that this aspect of the Judgment has been satisfied.

Defendants also state that the reclamation work has been performed, "so there is no danger that the Plaintiffs will be required to pay the State of Oklahoma under their bond." (Defendants' Motion for Relief from Judgment, p. 2). Again, the settlement agreement states that the bond already has been forfeited.

Therefore, Defendants' Motion for Relief from Judgment is hereby DENIED.

II.

In this Court's Summary Judgment Order, the Court found that Plaintiffs are entitled to reasonable attorneys' fees (Order of April 15, 1994, at p. 9-10). Judgment was entered on July 5, 1994, and Plaintiffs have applied for such fees pursuant to Local Rule 54.2.

L. Pommier and K. Pommier object to the motion, stating that they "had never attempted to delay or hinder the efforts of the Plaintiffs, nor did these Defendants ever try to evade any responsibilities. These Defendants should not be saddled with a large bill for attorney's fees." (Defendants' Objection to Application for Legal Fees, at p. 2). The Defendants did not allege that any of the billing was for unnecessary actions on the part of Plaintiffs' attorneys, nor did they allege that the hourly rates are unreasonable.

The Court, after considering the record before it, which includes the appropriate affidavits, concludes that

Plaintiff's attorneys' fee request in the amount of $23,181.24 is reasonable. The Court further concludes Plaintiff's Application for Attorneys' fees in the amount of $23,181.24 should be and is hereby GRANTED.

IT IS SO ORDERED THIS 31ST DAY OF August, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE